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No. 471

In the Supreme Court of the United States

OCTOBER TERM, 1961

JOHN J. BURKE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Statutes:

Internal Revenue Code of 1939, Sec. 145(b) (26 U.S.C. 1952 ed., Sec. 145(b)) — 2

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 17–22) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1961 (Pet. App. 23), and a petition for rehearing was denied on September 7, 1961 (Pet App. 24). The petition for a writ of certiorari was filed on October 5, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports the verdict.
2. Whether the district court erred in refusing to

subpoena a witness for petitioner at government expense.

3. Whether the petitioner, an attorney, was denied effective representation at trial by the failure of the district court to insist that he obtain counsel.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

Internal Revenue Code of 1954:

SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or im-

prisoned not more than 5 years, or both, together with the costs of prosecution.
(26 U.S.C. 7201.)

STATEMENT

On January 22, 1960, an indictment in four counts was returned against petitioner in the United States District Court for the District of Massachusetts, charging him with wilful attempted evasion of his income taxes for the years 1952 through 1955, in violation of Section 145(b) of the Internal Revenue Code of 1939 and Section 7201 of the Internal Revenue Code of 1954. Petitioner's reported and correct taxable income and tax liability, as alleged in the indictment, are as follows (App. 1-3)[1]:

	Reported		Correct	
	Income	Tax	Income	Tax
1952	($1,978.75)	$0.	$15,791.12	$4,223.74
1953	(2,206.68)	0	9,446.34	1,701.72
1954	1,355.00	0	6,431.68	736.97
1955	4,892.80	188. 0	9,445.71	1,267.88

On November 9, 1960, after a jury trial lasting twelve days, petitioner was found guilty on all counts (R. 1156). On December 16, 1960, he was sentenced to imprisonment for four months and fined $2,500 (App. 47).

Petitioner is a graduate of Brown University and of Harvard Law School; he is a member of the

[1] References to appellant's appendix in the court of appeals will be designated "App." References to the government's appendix in the court of appeals will be designated "Gov. App." References to the transcript of the trial proceedings will be designated "R."

Massachusetts Bar (R. 899–902). He practiced law from 1934 to 1937, but thereafter engaged in the operation of fishing vessels and related businesses, several of which were incorporated (R. 764–766; Pet. 3–4). He chose to defend himself at the trial.

Although petitioner's income tax returns for the years concerned reported a certain amount of income from some of the businesses in which he was involved (R. 452–454), the government's proof at the trial showed substantial additional payments to petitioner, unreported in his returns, from entities which he either owned or controlled (R. 454–467). These payments resulted in corrected taxable income and corrected tax liabilities for the years involved substantially as alleged in the indictment (R. 467–469).

Petitioner admitted the receipt of the unreported payments (Pet. 7–11). He claimed at the trial that he was not required to report some of the payments because they represented return of capital, and that he had actually overstated his taxable income because he had failed to claim deductible expenditures made by his corporations for his benefit. He testified that he had poured large amounts of his personal funds into the corporations during the years involved, and that he felt he was entitled to credit for their deductible expenditures because of the amount of money he had put into them. (R. 757–761, 774–778, 794–796, 815–818, 825–828, 844–849.) But petitioner was unable to point to any evidence in the corporate books that the corporations had received personal funds from him (R. 904–908, 943–949, 955–957, 1041, 1062, 1069), and the books actually showed that he had

borrowed in excess of $86,000 from the corporations (R. 473, 1112). Furthermore, although petitioner insisted that he had $14,000 in cash at the beginning of 1952 which went into the corporations, there was evidence that he had invested this amount in the purchase of race horses (R. 794–796, 943–961, 1095–1103).

The jury was carefully instructed that, in order to convict petitioner, it must find that he had understated his taxable income, and that he had done so, not by mistake, but with full knowledge of the understatement (R. 1131–1138). The jury was also instructed at length on the law as to allowable deductions (R. 1140–1147).

ARGUMENT

Further review by this Court is unwarranted. The decision of the court of appeals is correct and no conflict of decisions or important questions of law are presented.

1. Petitioner's main argument (Pet. 2, 7–14) is that the evidence is insufficient to support the verdict, because the government failed to prove that there was a substantial amount of unreported tax and that petitioner had wilfully falsified his returns. Petitioner assumes (Pet. 7–12) that he himself paid corporate taxes and interest through money he supplied to the corporations (Pet. 9), and that he should therefore be entitled to deduct these payments on his personal return. The same assumption underlies his contention (Pet. 12–13) that corporate payments to petitioner's estranged wife and to his creditors should be treated as return of capital to him, and his further

contention (Pet. 13–14) that he believed he had the right to offset the losses of one business against another. But all these contentions were rebutted by the government's evidence, and the conviction shows that the jury must have rejected petitioner's version. The argument, therefore, raises essentially a question of fact which merits no further review by this Court.[2]

2. Petitioner contends (Pet. 2, 14–15) that he was prejudiced by the trial court's refusal to have the witness Thomas Scanlon subpoenaed at government expense. But petitioner made no point at the trial of the importance of Scanlon's testimony to his defense, and, as the court of appeals observed (Pet. App. 21), he could have subpoenaed the witness himself had he so desired.[3] Furthermore, it is difficult to perceive how Scanlon could have added much to petitioner's case. Petitioner's testimony was that Scanlon had suggested that all petitioner's various business entities be run as one, and their funds, commingled. But even if Scanlon had fully corroborated petitioner on this point, the essential question in the

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[2] There is obviously no merit to the argument (Pet. 12) that petitioner should have been allowed deductions on the deflated value of his corporate stock.

[3] The conclusion of the court of appeals is supported by evidence introduced at the hearing on petitioner's motion for a subpoena, which showed that he was making about $1,000 a month from his oil business at the time (see Gov. App. 40–49). Furthermore, the government actually did subpoena several witnesses chosen by petitioner, but Scanlon was not included in petitioner's request. See the statement in the Government's brief in the court of appeals, pp. 5–6, approved by the trial judge by order dated March 29, 1961.

case would have still remained whether petitioner funneled his own funds into the corporations in such a way that the corporate payments in his behalf constituted, not taxable income, but a return of capital. As to this issue, there is no suggestion that Scanlon's testimony would have been of any assistance to petitioner.

3. Petitioner raises (Pet. 3, 15), for the first time, the contention that the trial judge should have seen that he lacked the skill and knowledge to handle his own defense and should have therefore insisted that petitioner obtain counsel to represent him. Since the indictment was returned in January 1960, and the trial did not begin until October 1960, petitioner had ample time to prepare his case. Moreover, the numerous pretrial motions petitioner filed (App. 4–38) and his conduct of the pretrial hearing on March 7, 1960 (Gov. App. 36–52) were sufficient to convince the trial judge that he should not interfere with petitioner's insistance on acting as his own counsel. The petition gives no record references to support the allegation of helplessness and lack of skill. Furthermore, in view of the circumstances, he was granted very considerable leeway in presentation of his own testimony (R. 755–899, 1050–1069), which undoubtedly would not have been the case had he been represented by counsel. When a defendant—especially one who is a graduate of an accredited law school and a member of the bar—insists on representing himself and manifests competence to represent himself, a court is not required to force counsel upon him. See *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 275,

279; cf. *Glasser* v. *United States*, 315 U.S. 60, 70; *Johnson* v. *United States*, 318 U.S. 189, 201.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted.

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